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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DORSIE LEE JOHNSON,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Did the Texas capital sentencing statute unconstitutionally preclude the jury from giving full mitigating effect to the petitioner's youthful age at the time of the offense?

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CITATION TO OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals on original submission is reported at 773 S.W.2d 322 (Tex. Crim. App. 1989). The opinion of that Court on rehearing is unreported; it appears at JA 178.

JURISDICTION

The Texas Court of Criminal Appeals denied rehearing in Mr. Johnson's case on May 27, 1992. His petition for certiorari was timely filed. This Court has jurisdiction under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Eighth Amendment to the United States Constitution reads in pertinent part:

> [N]or [shall] cruel and unusual punishments [be] inflicted.

The Fourteenth Amendment to the United States Constitution, reads in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law
> . . . .

The former Texas capital sentencing statute, Tex. Code Crim. Proc. Art. 37.071 (Vernon's ed. 1989), provided

> (b) On conclusion of the presentation of the evidence, [at the sentencing phase of a capital murder trial] the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> . . . .
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death
>
> . . . .

STATEMENT OF THE CASE

A. Course of Prior Proceedings

A Snyder, Texas jury convicted Mr. Johnson of capital murder on November 12, 1986. JA 151. The jury returned affirmative answers to the special issue questions of the former capital sentencing statute, and the judge sentenced Mr. Johnson to death as required by law. JA 152-153; *see* former Tex. Code Crim. Proc. art. 37.071 (Vernon's ed. 1989).

The Texas Court of Criminal Appeals affirmed Mr. Johnson's conviction and sentence. *Johnson v. State*, 773 S.W.2d 322 (Tex. Crim. App. 1989). Mr. Johnson sought rehearing, challenging his death sentence under this Court's then-recent opinion in *Penry v. Lynaugh*, 492 U.S. 302 (1989). The Texas Court denied rehearing. JA 181.

This Court granted review. *Johnson v. Texas*, __, U.S. __, 61 U.S.L.W. 3575 (Feb. 19, 1993).

B. Statement of facts

Nineteen-year-old Dorsie Lee Johnson, Jr., spent the evening of March 22, 1986, drinking beer at Butler's Cafe in Colorado City, Texas. S.F. Vol. XIII at 487. During the five hours or so he spent at Butler's, Dorsie drank twelve beers. *Id.* At approximately 1:30 a.m., Dorsie was invited to go joyriding with Janet Miles and her sister Amanda; he accepted. *Id.* at 488. Janet drove to her boyfriend's house in nearby Snyder, told Amanda she would be staying there, and left the car. *Id.* As they drove away, Amanda pulled a pistol from beneath the driver's seat, and asked Dorsie to join her in robbing the Allsup's convenience store a few blocks away. *Id.* Dorsie reluctantly replied that he "didn't know," and "hadn't never done anything like that."

Id. The pair then "drove around town for a while," discussing Amanda's proposal. *Id.* at 488, 490. When Amanda asked whether Dorsie were willing to eliminate any witnesses, he hesitated: "I ain't never did nothing like this." *Id.* After driving around a bit longer, and smoking "marijuana laced with some kind of dope," the pair eventually entered the store. *See* S.F. Vol. XIII at 431.

After he and Amanda went into Allsup's, Dorsie asked to buy a gallon of orange juice. S.F. Vol. XIII at 491-492. The clerk, Jack Huddleston, walked into the cooler to see whether he had any large containers on hand, and Dorsie followed. *Id.* Dorsie then pulled Amanda's gun from his pocket and ordered the clerk to lie on the floor. *Id.* at 492. After he did so, Dorsie shot him once, killing him instantly. *Id.*; *see also id.* at 371-372. When Dorsie emerged from the cooler, Amanda had already emptied the cash register. *Id.* at 492. Amanda drove them back to Colorado City, where she counted out the proceeds and gave Dorsie half. *Id.* at 493.

Dorsie Johnson was arrested about two weeks later in connection with an unrelated offense. He was tried seven months later, in November, 1986. During jury selection, the prosecutor employed hypothetical questions that encouraged jurors to blur the already indistinct line between "intentional" and "deliberate" conduct.[1] He also suggested

[1] *See, e.g.*, S.F. Vol. XII at 4847 (prosecutor has "no problem" with juror Gilbert Garcia's definition: "[D]eliberately [is] when he killed a person, when he didn't have to, [and] intentionally to me that he went in there with the intention to do it"), 4850 (Prosecutor to juror Garcia: "If [I] see somebody standing at that door and I go [ahead] and shoot them, now, then, I am deliberately causing their death. I am deliberately doing something that would deliberately cause their death and with a reasonable expectation that death would result. In other words, if I shoot a gun at somebody, I have got to have a reasonable expectation that they could die from that"); S.F. Vol. X at 4208 (Prosecutor to juror Treva Quinney: "The law says it really doesn't matter whether or not the Defendant has been planning to commit this robbery and

to several jurors that "threatening to punch someone in the nose" or even "breaking windows" would support an affirmative answer to the second special issue.[2]

After the jury returned a verdict of guilt, the State presented its case for the death penalty. The State's first several witnesses described Dorsie's childhood. Rocky Salazar, who had known Mr. Johnson "most all [his] life," recounted how, at age twelve, Dorsie had cut him with a piece of glass one afternoon before junior varsity football practice.[3] S.F. Vol. XV at 6-7. Another classmate described a similar incident from the following year. *Id.* at 15-17. The State also introduced Mr. Johnson's complete middle school records. JA 108-124. The records described, *inter alia*, Dorsie's giving a teacher "the finger" in class, cutting in line in the cafeteria, and giggling uncontrollably at a classmate's joke. JA 113, 121-123.

kill the clerk for two weeks or two hours or two minutes or two blinks of an eye. If he did it, if he did commit the robbery and did commit the murder intentionally and deliberately, then how much forethought and planning went into it really doesn't matter. The man is still dead"); S.F. Vol. IX at 3509-3510 (juror Tracy Lammert: "[W]e never would have reached guilty if [special issue] number one probably wasn't answered." *Id.*: "I'm sure [that] they'll prove to me that the man deliberately killed this man. . . . I mean, you don't just accidentally kill people"); *see also* S.F. Vol. XI at 4598-99 (juror Carolyn Hamby) (hypothetical failing meaningfully to distinguish "deliberate" from "intentional"); S.F. Vol. IX at 3708 (juror Freda Rayvon) (same); S.F. Vol. IX at 3509-3510 (juror Tracy Lammert) (same).

[2] *See, e.g.*, S.F. Vol. XI at 4602 (Prosecutor to juror Carolyn Hamby: "[Criminal acts of violence] might include criminal mischef [sic]. Somebody going around and breaking out all the windows in school. That is a violent—that is an act of violence"); S.F. Vol. IX at 3710 (Prosecutor to juror Freda Rayvon: threatening to punch in nose, without actually striking, is criminal act of violence).

[3] Defense counsel objected to the introduction of evidence of this unadjudicated juvenile offense, and renewed his objection as the State presented other, similar evidence. *See, e.g.*, S.F. Vol. XV at 7-8. The trial court, consistent with Texas authority, denied the objections. *See* text *infra*.

The prosecution's witnesses also recalled other events involving Dorsie as a teenager. Douglas Smith accused Dorsie of "assisting" him in burglarizing a sporting goods store at fifteen; Smith was eighteen at the time. S.F. Vol. XV at 74-75. Paula Williams, a lifelong acquaintance of Mr. Johnson's, described how sixteen-year-old Dorsie ran around with friends who drank and used drugs, despite her attempts to keep him away from them. *Id.* at 135-138. Probation officer John Bahlmann recalled how, as a probationer in the spring of 1985 two years later, Mr.Johnson had proven unable to stop using marijuana. S.F. Vol. XV at 109, 111.[4]

The prosecution's witnesses also described Mr. Johnson's downward spiral in the spring of 1986. Paula Williams confirmed that nineteen-year-old Dorsie was constantly "smoking dope" and drinking; his worsening drug habit by that time included cocaine. S.F. Vol. XV at 140. She recounted how Dorsie, heavily intoxicated, had brandished an axe threateningly in the yard as she watched from indoors. *Id.* at 141-142. Beverly Johnson, a family friend, testified to Dorsie's escalating drug use; she and other witnesses described several incidents around the time of the Allsup's robbery in which his intoxication was accompanied by moodiness, impulsivity, and threats of violence. *Id.* at 160-164, 177-178; *see also id.* at 218, 245.

Finally, the prosecution presented several witnesses who detailed Dorsie Johnson's involvement in an aggravated robbery about two weeks after the Huddleston murder. In that offense, Dorsie had accompanied Amanda's brother George Miles to rob Tom Burrus' store in Colorado City.

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[4] Mr. Johnson was on probation for a second burglary. S.F. Vol. XV at 96. At closing argument, the prosecutor emphasized that these non-violent burglaries (both of businesses) supported an affirmative answer to the "continuing threat" inquiry of the second special issue, *see infra*, despite the issue's apparent focus on "criminal acts *of violence*." JA 54.

S.F. Vol. XV at 333. During the holdup, Dorsie shot Mr. Burrus in the face and George Miles stabbed Mr. Burrus in the back. *Id.* These wounds were not fatal. *Id.*

The defense presented the testimony of Dorsie's father, Dorsie Lee Johnson, Sr. JA 10-48. He recalled taking Dorsie Jr., his youngest child, to church, and Dorsie's involvement in the youth department and choir. JA 23, 14. He told of Dorsie's childhood bouts with bronchitis, which sometimes kept him hospitalized for days at a time, under an oxygen tent. JA 16. Partly as a result of his periodic illness, but also as a result of a "devilish" temperament, Dorsie periodically missed school. JA 15-16.

Mr. Johnson, Sr., also testified that he had separated from Dorsie's mother in 1980, and that she had moved to Waco. JA 14-15. Four years later, Dorsie's mother was incapacitated by a stroke, and died soon after. JA 15, 20. Mr. Johnson, Sr., first learned of his son's involvement with drugs when he visited Dorsie and his sister in Waco after their mother's death. *Id.* Dorsie's sister had been "getting on him" about the risks of his drug use, but was herself murdered in 1985. *Id.* These tragedies "sort of set [Dorsie] off;" he turned more frequently to drugs, trying to "find some relief." *Id.* He had been "wrapped up in his mother [and] his older sister;" their death left him "just devastated." JA 20, 23.

Asked what could have led his son to do the "horrible things" of which he had been convicted, Mr. Johnson, Sr., drew this conclusion:

> The only answer is the answer I get from everywhere else from every angle of life, every part of life that I know about is foreign substances, drugs. . . . [F]rom all of the books I've read and studied about it, it makes you worse. It alters you. They alter your thinking. They alter your habits. They alter your control. And once you're deprived of it . . . [you] can be rehabilitated. Then

> if you get—if you let it alone, you can [be] a different person. . . . [T]hat's my son and I love him. And I'd plead before President Reagan and anybody else for a chance for him. And I say lock him up, get him away from the environment and these habits and he could be a different person.

JA 25, 26. He also rued the company his youngest son had kept since age seventeen: youths with the "[s]ame problem: [d]rugs, drinking." JA 26. Asked whether Dorsie had gotten away from "those folks," his father answered plaintively, "Lord oh mercy, I wish he had." JA 27. In light of all he knew about his son, he confirmed that Dorsie was not "a real mature person" at nineteen:

> A: No, no. Age of nineteen? No, sir. That, also, I find to be a foolish age. That's a foolish age. They tend to want to be macho, built-up, trying to step into manhood. You're not mature-lized for it.

Id.

Finally, he described how Dorsie, Jr., had cried over his role in the offense, and the apparent ruin of his life: "Daddy, I wish I could change it. I wish it never had happened. I wish I had listened more closely to what you said and the way I was raised. I just got off, got into that stuff. It got the best of me." JA 30. As he summed up his plea for his teenage son:

> [A]ll I can say is I still think that a kid eighteen or nineteen years old has an undeveloped mind, undeveloped sense of assembling not—I don't say what is right or wrong, but the evaluation of it, how much, you know, that might be—well, he just don't—he just don't evaluate what is worth—what's worth and what's isn't like he should like a thirty or thirty-five year old man would. He would take under consideration a lot of things that a younger person that age wouldn't.

JA 47.

At closing argument, defense counsel asked "not . . . for leniency," but for "the appropriate punishment under the evidence." JA 62. He attempted to broaden the jury's inquiry into "deliberateness," despite the fact that the trial court had refused to given them a broadening definition:

> Did he have full realization as to what he was doing? So the mitigating circumstances to that might be his age. I don't know that that is all of the mitigation in the case if he should have at the age of nineteen full realization. . . . Now, he is—you look at him. He is a person. He is a human being. That is something you should remember. He is not just a Defendant. He is a human being.

JA 63, 70. He urged the jury to conclude that "there is a possibility that [Dorsie] can change." JA 81.

The prosecutor, however, insisted that the jury find that nineteen-year-old Dorsie Johnson, Jr., posed a "continuing threat" as he stood before them, and in the immediate future:

> I will agree that it is possible that he may change. . . . Would you agree that we cannot predict twenty or forty years down the road what somebody is going to be like? I will agree. . . . How many more Jack Huddlestons, how many more Don Burrus do we have to put in the grave before concluding we can't wait for Dorsie Johnson to change again twenty or forty years from now? . . . I don't want us to have the same regret while we wait twenty or forty years and count the [victims]. . . .

JA 91, 107.

Defense counsel had objected to the court's charge at punishment, requesting special instructions to broaden the inquiry of the narrow "special issues." *See* S.F. Vol. XV at 399-409. The Court refused to permit an additional instruction that would have permitted the jury to consider mitigating evidence *outside* the framework of the special issues. Instead, the trial judge merely modified the statutory instructions to direct the jury to consider mitigating evidence "in determining each of these [special] issues." *Id.* at 404; *see* text *infra*.

The jury returned affirmative answers to the special issues and the court sentenced Mr. Johnson to death as required by statute. JA 152-153.[5]

SUMMARY OF ARGUMENT

The Eighth Amendment entitles capital defendants to an individualized determination of sentence. As the Court's recent decisions make clear, the essential goal of individualization is to assure that the sentence imposed reflects a "reasoned moral response" to both the offender and his crime. In rejecting mandatory capital sentencing provisions, this Court has emphasized that the most extreme punishment must be reserved for the most culpable offenders. Accordingly, capital defendants must be permitted to present, and sentencers must be allowed to consider, evidence that reflects the defendant's reduced culpability.

At the same time, States may structure and regulate the sentencer's consideration of mitigating evidence in order to promote the equitable and rational administration of the death penalty and to assure reliability in the imposition of the ultimate sanction. In structuring the consideration of mitigating evidence, however, a State may not define the relevant factual inquiries so narrowly that

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[5] *See* (former) Tex. Code Crim. Proc. Art. 37.071 (e) (Vernon's ed. 1989).

the sentencer is precluded from considering evidence bearing on the defendant's culpability; the sentencer must remain free to assess the moral guilt of the defendant in order to make the sentence fit both the crime and the criminal.

The Texas jury that sentenced nineteen-year-old Dorsie Lee Johnson for his role in a robbery-murder was asked two factual questions: whether he had killed "deliberately," and whether he would pose a "continuing threat" of violence to the community. The jury answered both questions "yes," and, solely on the basis of those answers, the trial court sentenced Mr. Johnson to death as required by state law.

This Court's decisions, as well as our traditions and experience, confirm that a defendant's youth at the time of the crime is a powerful mitigating factor relevant to the sentencer's choice between life and death. This Court's frequent reference to youth in its Eighth Amendment decisions reflects the widespread societal understanding that a defendant's youth bears uniquely on his moral culpability.

The Texas special issue scheme, however, did not permit Mr. Johnson's jury to consider his youth as reducing his moral culpability. Under Texas law, the first special issue focused solely on the brief moments during which the crime unfolded rather than on the youthful immaturity and impulsivity that colored Mr. Johnson's judgment at the time. Accordingly, the jury could well have concluded that Mr. Johnson acted "deliberately"—necessitating a "yes" answer to the special issue—without concluding that the death penalty was an appropriate punishment for a person of Mr. Johnson's limited experience and unformed character.

The second special issue, on the other hand, required the jury to predict a future fact—the likelihood that Mr. Johnson would commit further violent acts. Mr. Johnson's youth could have been minimally relevant to this determination if the jury concluded that his youth made him a

strong candidate for rehabilitation. But this question, like the first special issue, did not permit the jury to consider whether Mr. Johnson's youth reduced his culpability for the crime already committed, thus warranting a less severe punishment. Moreover, while Mr. Johnson's jury was prevented from considering the most powerful mitigating aspects of his youth, it might easily have given his youth aggravating weight. Mr. Johnson's youth would not dissipate immediately, and the jury might well have regarded him as a continuing threat to society in the interim.

Accordingly, Mr. Johnson's jury was unable to express a reasoned moral response to his youth as it answered the special issues that dictated his fate. The Eighth Amendment thus requires that Mr. Johnson be resentenced by a properly instructed jury.

ARGUMENT

A. THIS COURT'S DECISIONS CONFIRM THAT THE EIGHTH AMENDMENT REQUIREMENT OF INDIVIDUALIZED SENTENCING IS PRIMARILY DESIGNED TO PERMIT SENTENCER CONSIDERATION OF A CAPITAL DEFENDANT'S REDUCED MORAL CULPABILITY.

This Court's recent Eighth Amendment jurisprudence reveals the systematic exposition of a central unifying idea: that a capital sentencing jury's decision must reflect a "reasoned moral response" to the offender and his offense. To ensure such a response, this Court has required that the jury have discretion to consider the defendant's mitigating evidence as it bears on his personal culpability. That sentencer consideration of reduced culpability has been the touchstone of this Court's individualization requirement is reflected in a number of decisions culminating in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

In *California v. Brown*, 479 U.S. 538 (1987), for example, the Court considered whether the rule of *Lockett*

v. Ohio, 438 U.S. 586 (1978) (plurality opinion) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), was infringed by an instruction that jurors not consider "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling" during their penalty phase deliberations. *Brown*, 479 U.S. at 539. In *Lockett* and *Eddings*, the Court held that a capital sentencer must be free to consider, as a mitigating factor, any evidence about the character and record of the defendant, or the circumstances of the offense, proffered as a basis for a sentence less than death. *Lockett*, 438 U.S. at 607; *Eddings*, 455 U.S. at 113-114. The question, then, was whether this cautionary instruction denied the defendant's right to have the jury consider his mitigating evidence. The Court held that a reasonable interpretation of the charge as a whole would not have precluded the jurors from properly evaluating the defendant's evidence. *Brown*, 479 U.S. at 541-542.

Justice O'Connor, however, wrote separately, and addressed what she perceived as the larger issue in the case—namely, the scope of the defendant's substantive entitlement to the consideration of his mitigating evidence, and how the challenged instruction might affect that right. *Id.* at 545-546. Recognizing that Anglo-American jurisprudence had long focused on "culpability" in sentencing decisions, as the common law struggled to develop a capital punishment system that is "sensible to the uniqueness of the individual," Justice O'Connor maintained that "*Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* (Citation omitted).

Accordingly, she concluded, "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." *Id.* Such an inquiry should result in a sentence that reflects "a

reasoned *moral* response to the defendant's background, character, and crime." *Id.* (Emphasis in original).[6]

Two other decisions from the same Term, although they did not speak explicitly of the jury's sentencing decision as a"reasoned moral response," plainly embraced the same emphasis on the defendant's personal culpability as the focus of capital sentencing. First, this Court reconsidered the statute it had facially approved in *Proffitt v. Florida*, 428 U.S. 242 (1976), and determined that *Proffitt*'s scheme *in practice* could deny the jury full authority to consider and give effect to mitigating evidence. *Hitchcock v. Dugger*, 481 U.S. 393 (1987). Hitchcock had introduced mitigating evidence

> that as a child [he] had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that [he] had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that [he] had been a fond and affectionate uncle to the children of one of his brothers.

Hitchcock, 481 U.S. at 397. This Court observed that the Florida statute under which Hitchcock was sentenced con-

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[6] Justice O'Connor's focus on the "moral" character of the sentencing inquiry was not new; her carefully crafted phrase in *Brown* ("reasoned moral response"), like her discussion of *mens rea* in *Tison v. Arizona*, 481 U.S. 137 (1987), reflected her view that the jury's choice between life and death must involve a rational judgment about appropriate *retribution* for a particular crime. *See Graham v. Collins*, ___ U.S. ___, 113 S.Ct. 892, 924 n.9 (1993) (Souter, J., dissenting) ("reasoned moral response" is "appropriate shorthand" for the individual assessment of culpability required by *Lockett* and *Eddings*); *see also Tison*, 481 U.S. at 149 (discussing relationship between *mens rea* and retribution rationale); *Bullington v. Missouri*, 451 U.S. 430, 450 (1981) (Powell, J., dissenting) ("The [capital] sentencer's function is not to discover a fact, but to mete out just deserts as he sees them").

fined consideration of "mitigating circumstances" to those enumerated in the statute. Because Hitchcock's mitigating evidence could not be fully considered within the enumerated mitigating circumstances, the Court unanimously concluded that such a proceeding deprived Hitchcock of his right to an individualized determination of sentence. Accordingly, resentencing was ordered. *Id.* at 399.[7]

The Court noted that Hitchcock's trial counsel had urged the jury to focus on the "overall picture" of his client, in addition to considering those facts that supported the enumerated mitigating circumstances of the former Florida statute. In particular, counsel urged the sentencing judge (after the jury's adverse recommendation) to consider Hitchcock's troubled background as he decided Hitchcock's punishment. Consideration of such background evidence is indisputably essential to a reasoned moral response. Thus, while the vocabulary of *Hitchcock*'s Eighth Amendment analysis was not yet Justice O'Connor's, its result very closely reflected the spirit of her *Brown* concurrence.[8]

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[7] Thus *Hitchcock*, like *Penry*, involved a reexamination—in light of *Lockett* and *Eddings*—of a statute previously found facially constitutional. Although in 1976 the statute approved in *Proffitt* had not "clearly operated . . . to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," experience demonstrated that the statute as applied had precisely such an effect in cases where the defendant's mitigating evidence did not fit neatly or exclusively into the categories enumerated by the *Proffitt* scheme. *See Penry*, 492 U.S. at 317 (quoting *Lockett*, 438 U.S. at 607).

[8] The same day this Court issued *Hitchcock*, it announced its opinion in *McCleskey v. Kemp*, 481 U.S. 279 (1987). As it had in *Hitchcock*, the Court in *McCleskey* rejected the notion that "shoehorning" relevant mitigating evidence into ill-fitting categories could satisfy the Eighth Amendment's individualization requirement: "[i]f capital defendants are to be treated as 'uniquely individual human beings,' *then discretion to evaluate and weigh the circumstances relevant to the individual defendant and the crime he committed is essential.*" *Id.* at 313 n.37 (emphasis added; citation omitted).

Likewise, in *Sumner v. Shuman*, 483 U.S. 66 (1987), the Court held that even a very narrowly defined, highly aggravated category of murder—committed by a prisoner already serving a sentence of life without parole—could not justify an automatic sentence of death upon conviction. *Id.* at 81-82. As the Court reasoned,

> These two elements of capital murder[9] do not provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case. . . . Past convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant *deserves to be sentenced to death* for a later murder, but the inferences to be drawn concerning an inmate's character *and moral culpability* may vary depending on the nature of the past offense.

Id. at 78, 81 (emphases added). Here, for the first time, a majority of the Court identified the capital sentencing jury's task as "drawing inferences" about the defendant's "*moral* culpability," based on relevant mitigating evidence. *Shuman*'s implicit approval of the rationale of Justice O'Connor's concurrence in *Brown* suggested that the Court had finally embraced culpability as an essential focus of capital sentencing.

In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), the Court held that a defendant's evidence of a clean prison disciplinary record could adequately be considered under the Texas special issues scheme. Justice O'Connor's critical concurrence emphasized that the Texas scheme fairly addressed the defendant's evidence because its full meaning

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[9] The two elements were "that [the defendant] had been convicted of murder while in prison, [and] that he had been convicted of an earlier criminal offense which, at the time committed, yielded a sentence of life imprisonment without possibility of parole." *Shuman*, 483 U.S. at 78.

could be considered within the second special issue; evidence of a good prison record is *only* important in that it suggests that a defendant is less likely to be dangerous in the future. At the same time, Justice O'Connor maintained that the "principle underlying *Lockett*, *Eddings*, and *Hitchcock*, is that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 184. Accordingly, if a defendant presented mitigating evidence regarding reduced culpability "that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence. *Id.* at 185.

Franklin confirmed that *Jurek v. Texas*, 428 U.S. 262 (1976), remained good law: the former Texas special issue scheme did not *invariably* preclude sentencer consideration of mitigating evidence. But *Franklin* also suggested that in some cases the former scheme would not permit adequate consideration of a defendant's personal moral culpability, and, in such circumstances, that the Eighth Amendment's guarantee of individualized sentencing would require an additional instruction.

A majority of this Court adopted Justice O'Connor's position in *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry*, the defendant sought juror consideration of his mental retardation at the punishment stage of his capital trial. Penry's mental retardation, and the resulting limitations on his ability to understand the meaning of his actions, undoubtedly reduced Penry's moral culpability for his crime. Yet the Texas special issues, by focusing on the factual issues of "deliberateness" and future dangerousness, did not permit Penry's jury to determine Penry's sentence in light of his reduced culpability. Accordingly, the failure of the Texas scheme to afford a "reasoned moral response" to Penry's evidence required reversal of Penry's sentence.

B. STATES MAY STRUCTURE SENTENCER CONSIDERATION OF MITIGATING EVIDENCE TO ENSURE THAT A SENTENCING DETERMINATION TRULY REPRESENTS A "REASONED MORAL RESPONSE" TO AN OFFENDER AND HIS OFFENSE.

The Court's decisions clarifying the underlying purpose of the individualization requirement have insisted that personal moral culpability should be the core concern of capital sentencing. At the same time, this Court has acknowledged in several decisions that States may "structure" the sentencer's inquiry into the appropriateness of a death sentence. Such structuring is permissible so long as it increases the reliability of capital proceedings and does not preclude sentencers from effecting their "reasoned moral response" in imposing sentence. The Court's decisions concerning State efforts to "shape" or "guide" the reception and consideration of mitigating evidence have carefully distinguished permissible procedural regulation from impermissible limitations on the consideration of mitigation evidence.

First, as a general matter, States are free to "structure and shape consideration of mitigating evidence," in order to achieve "a more rational and equitable administration of the death penalty." *Boyde v. California*, 494 U.S. 370, 377 (1990). States certainly retain a strong interest in assuring that the sentencer's decision is "reasoned" rather than purely emotional or arbitrary. This conclusion is apparent from the types of "structuring" and "shaping" devices this Court has approved; for example, the Court has endorsed instructions requiring the jury to "render its decision on the evidence without sympathy," *Saffle v. Parks*, 494 U.S. 484, 490 (1990) or to avoid the influence of, *inter alia*, "public opinion or public feeling." *Brown*, 479 U.S. at 539.[10] Nei-

[10] In light of those decisions, instructions mandating that the jury not consider the "race, color, religious beliefs, national origin, or sex" of the defendant in determining sentence would also appear to pass con-

ther practice circumscribes the jury's ability to assess the mitigating significance of the defendant's evidence in a given case. Nor does either rule preclude the jury's ultimate moral judgment that death is an excessively harsh sentence for a particular defendant, in light of his reduced culpability. Indeed, precisely because the sentencer's response should be *reasoned* and *moral*, States may prevent jurors from deciding capital cases on mere whim or sympathy. These cases, therefore, do not support State efforts to *deprive* jurors of an opportunity to gauge the moral culpability of a defendant.

Permissible State "structuring" of sentencer consideration of mitigating evidence also includes the assignment of presumptions and the distribution of burdens of proof. For example, this Court has authorized a presumption, once an aggravating factor has been proved, that death is the appropriate sentence unless the jury finds some mitigating factor sufficiently substantial to call for a lesser sentence. *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990); *see also Boyde*, 494 U.S. at 377 (same). Even under those schemes, however, the jury retains the ability to consider and to give effect to evidence of reduced culpability, and to make those determinations dispositive in imposing sentence. *See Blystone*, 494 U.S. at 305; *Boyde*, 494 U.S. at 381-384. If the jury concludes that *any* substantial aspect of the defendant's character or background reduces his culpability so as to make a death sentence unwarranted, it may enforce that "reasoned moral response" by returning a lesser sentence. In effect, the guidelines endorsed in *Blystone* and *Boyde* operate only in marginal cases, as a means of restraining juries from exercising capricious leniency in much the same manner as the antisympathy instruction approved in *Brown*.

stitutional muster. *See* Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848 (O) (1) (1988) (requiring capital sentencing jury to certify that no such influences affected its verdict).

This Court has also permitted States to require the defendant to bear the burden of proving mitigating circumstances, and to prove them by a preponderance of the evidence. *Walton v. Arizona*, 497 U.S. 639, 649-651 (1991). These rules may contribute to the overall reliability of a capital sentencing scheme by guaranteeing that the sentencer's "reasoned moral response" is based on sufficiently strong evidence. The "burden of proof" rule simply requires jurors to confirm that evidence of a particular mitigating circumstance is in fact substantial before they proceed to the essentially moral judgment of whether it lessens the defendant's culpability and thus makes death an inappropriate sentence.

Taken together, these cases confirm that States may devise capital sentencing procedures that reduce the possible influence of "whim or caprice," as long as those rules do not truncate "full and fair consideration of mitigating evidence." *Saffle*, 494 U.S. at 493. When a State exceeds this license, however—by precluding the jury from expressing its "reasoned moral response" to evidence of the defendant's reduced culpability—it has overstepped the constitutional bounds of permissible regulation. As the following discussion makes plain, the former Texas "special issues" operate in precisely this fashion when a defendant offers evidence of reduced culpability; rather than guiding the sentencer's discretion in a manner that promotes the rational administration of the death penalty, the Texas scheme precludes the jury from confronting the central moral question in capital sentencing—whether the defendant's reduced culpability justifies a sentence less than death. Far from ensuring that a jury's response is "rational," or based on substantial evidence, the Texas scheme risks intolerably arbitrary results, by exposing some defendants to a death sentence despite the fact that their culpability does not justify such a harsh sentence.

C. MR. JOHNSON'S YOUTH COULD NOT BE ADEQUATELY CONSIDERED WITHIN THE FORMER TEXAS SPECIAL ISSUE SCHEME BECAUSE THE SPECIAL ISSUES DO NOT PERMIT SENTENCER CONSIDERATION OF YOUTH AS IT BEARS ON THE DEFENDANT'S MORAL CULPABILITY.

1. In accordance with this Court's decisions, as well as the Nation's traditions and human experience, youth is powerfully mitigating precisely because a youthful defendant may fairly be regarded as less culpable than an older and more experienced one.

Before addressing why the former Texas special issues failed to afford the jury adequate discretion to consider Mr. Johnson's youth, it is appropriate to review briefly why youth has such extraordinary mitigating power to reduce a defendant's culpability in the eyes of a jury. A proper appreciation of the mitigating significance of youth reinforces the conclusion that the former Texas scheme as applied in his case denied Mr. Johnson an individualized sentencing determination.

If, as this Court's decisions teach, "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant," then youth surely remains the archetypal mitigating factor that reasonably may justify a sentence less than death. *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). At least three sources confirm this basic insight: this Court's own cases, the considered opinions of scientific experts, and the experience of jurors themselves.

First, this Court has always specifically acknowledged the mitigating power of a defendant's youth. When this Court has enumerated the factors that sentencers must consider in determining the defendant's fate, youth has assumed a primary place. *See, e.g., Sumner v. Shuman*, 483 U.S. 66, 81-82 (1987); *Lockett v. Ohio*, 438 U.S. 586,

608 (1978) (Ohio capital sentencing statute unconstitutional because, *inter alia*, "considerations of a defendant's comparatively minor role in the offense, or *age*, would generally not be permitted, *as such*, to affect the sentencing decision") (first emphasis added); *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637 (1977); *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.).

Moreover, when a majority of this Court adopted the rule of *Lockett*, *supra*, it specifically emphasized the critical importance of a defendant's youth and youthful infirmities in reducing his culpability:[11]

> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. *Eddings was a youth of sixteen years at the time of the murder.* . . . The trial judge recognized that *youth must be considered a relevant mitigating factor.* But youth is *more than a chronological fact.* It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. . . . [J]ust as *the chronological age of a minor is itself a relevant mitigating factor of great weight*, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

[11] While this Court has held that defendants as young as sixteen are not *per se* exempt from the death penalty, it noted in so holding that "individualized consideration is a constitutional requirement [in capital cases, and] one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age." *Stanford v. Kentucky*, 492 U.S. 361, 375 (1989).

Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982) (all emphases added) (citations omitted).[12]

This unbroken line of authority is consistent with opinions expressed in the most influential scientific literature:

> Only under the pressure of painful adolescence does [the youth] gradually learn to impose restrictions upon his impulses and to accept the demands of society without conflict, and thus become social.

Aichhorn, *Wayward Youth* at 6 (introduction by Sigmund Freud) (Viking ed. 1963). Social science universally accepts that young people are less intellectually mature, more prone to faulty judgment, more susceptible to the influence of others, and less accustomed to making moral decisions than are their elders. Young people likewise may not easily learn from experience or mistakes; as Erik Erikson explained in his pathbreaking work, *Childhood and Society*:

> In their search for a new sense of continuity and sameness, adolescents have to refight many of the battles of earlier years, even though to do so they

[12] This Court's conclusions with respect to the powerful mitigating relevance of a capital defendant's youth have been echoed by numerous courts. *See, e.g., Hill v. Lockhart*, 927 F.2d 340, 343 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 344 (1991); *Magill v. Dugger*, 824 F.2d 879 (11th Cir. 1987); *High v. Kemp*, 819 F.2d 988, 993 (11th Cir. 1987); *Moore v. Balkcom*, 716 F.2d 1511, 1524 (11th Cir. 1983), *cert. denied*, 465 U.S. 1084 (1984); *People v. Frank*, 798 P.2d 1215 (Cal. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2816 (1991); *State v. Searcy*, 798 P.2d 914, 921 (Idaho 1990); *State v. Barber*, 753 S.W.2d 659, 669 (Tenn. 1988), *cert. denied*, 488 U.S. 900 (1988); *Brown v. Francis*, 326 S.E.2d 735 (Ga. 1985), *cert. denied*, 474 U.S. 865 (1985); *Finney v. State*, 320 S.E.2d 147 (Ga. 1984), *cert. denied*, 470 U.S. 1088 (1985); *Ice v. Commonwealth*, 667 S.W.2d 671, 680 (Ky. 1984), *cert. denied*, 469 U.S. 860 (1984); *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982).

The traditional importance of youth as a mitigating factor is also reflected in the fact that twenty-nine state legislatures have specifically designated the defendant's age as a mitigating factor in capital cases. *See Stanford*, 492 U.S. at 375, 375 n. 5 (listing statutes).

> must artificially appoint perfectly well-meaning people to play the roles of adversaries. . . . Adolescence is the age of the final establishment of a dominant positive ego identity.

Id. at 261-263, 306. (1963).

Indeed, young people characteristically are so unable to weigh alternatives or evaluate the consequences of their conduct that they may unintentionally imperil themselves or others:

> The adolescent lives in an intense present: 'now' is so real to him that past and future seem pallid by comparison. Everything that is important and valuable in life lies either in the immediate life situation or in the rather close future.

Kastenbaum, Time and Death in Adolescence, in Feifel, ed., *The Meaning of Death* 99, 104 (1959). In sum, the difference that separates young people from adults is their "immature, undeveloped ability to reason in an adultlike manner." Streib, *Death Penalty for Juveniles* 3-20, 184-189 (1987).

Finally, youth undeniably possesses at least one *unique* quality as a mitigating factor: every juror has, at some point, herself been young. Most other familiar mitigating factors are outside jurors' actual experience; as a result, they can only appreciate the destructive consequences of circumstances such as desperate poverty, child abuse, mental illness, and mental retardation by analogy to their own life experience. Even if particular jurors might have suffered youth's infirmities to a greater or lesser degree, however, each has a *real*, *immediate* and *subjective* appreciation of the uncertainty, turmoil, and struggle that characterize that "time and condition of life." The dramatically increased mitigating power which youth may attain as a result should not be underestimated.

The sentencer in a capital case must be permitted to consider and give effect to both the mitigating qualities of "youthfulness" and the chronological fact of youth itself in assessing the defendant's culpability. As this Court noted in *Eddings*, even a normal teenager "customarily lacks the maturity of an adult," and the typical youthful defendant is hardly normal, frequently having been "deprived of the care, concern, and parental attention that children deserve." 455 U.S. at 116. These mitigating qualities, while not suggesting "an absence of responsibility for the crime of murder," nevertheless may call for a sentence less than death and so must be duly considered in sentencing. *Eddings*, 455 U.S. at 116. Thus, a teenage defendant's lack of maturity, impulsiveness, inability to weigh consequences, and poorly developed sense of responsibility, as well as the bare fact of his age alone, are directly relevant to his moral culpability, and to the jury's "reasoned moral response" concerning the appropriateness of the death penalty. It follows that a sentencing scheme which, as applied, precludes the sentencer from giving independent mitigating weight to a youthful defendant's reduced culpability violates the Eighth Amendment.[13]

The foregoing discussion demonstrates why youth, perhaps above all other potential mitigating factors, can elicit the reasoned moral response that a defendant's reduced culpability does not warrant the death sentence in a given case. However, as detailed *infra*, the jury that sentenced nineteen-year-old Dorsie Lee Johnson was unable to voice the conclusion that his youth justified a life sentence notwithstanding the answers to the narrow special issue questions.

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[13] Justice O'Connor noted that "of course, the relevant Oklahoma statute permits the defendant to *present* evidence of any mitigating circumstance." *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring) (emphasis added). Because the sentencer could not *consider* and *give effect* to this evidence, however, the young defendant's death sentence violated the constitution. *Id.*

2. The first special issue's narrow focus on the "deliberateness" of Mr. Johnson's actions at the time of the offense did not permit his jury to consider his youth as lessening his moral culpability.

This Court's analysis in *Penry v. Lynaugh*, 492 U.S. 302 (1989), illustrates why the "deliberateness" question did not permit the jury adequately to consider Mr. Johnson's youth and other circumstances[14] in mitigation of punishment. At the sentencing phase of Mr. Johnson's capital trial, the jury has already found beyond a reasonable doubt that he had killed "intentionally."[15] Thus, to be confident that Mr. Johnson's mitigating evidence received its constitutional due under the first special issue, this Court must conclude that a reasonable juror would have distinguished "deliberate" from "intentional" conduct in a manner that would permit full consideration of relevant evidence bearing on Mr. Johnson's personal culpability. The *Penry* Court expressed skepticism about the reasonableness of such an assumption; given the similarity between these terms as commonly understood and the Texas

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[14] Because this Court granted review on the narrow question whether additional instructions were required to permit adequate consideration of Mr. Johnson's youth, Mr. Johnson does not suggest that this Court need separately assess the adequacy of the jury charge with respect to his other mitigating evidence, including heavy drug and alcohol use, emotional upheaval after his mother's death and his sister's murder, and remorse for the offense. However, this Court cannot gauge the constitutional adequacy of the "special issues" as applied to Mr. Johnson without measuring the mitigating power of his youth against the other facts and circumstances of his character and background revealed at trial. *See Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982) (noting that mitigating value of defendant's youth is increased where his background reveals emotional disturbance and turbulent home environment). Of course, if this Court concludes that the absence of additional instructions, in light of Mr. Johnson's *other* mitigating evidence, requires resentencing, Sup. Ct. Rule 24.1 (a) permits the Court to address such a plain error.

[15] *See* Tex. Pen. Code § 19.03 (a) (2) (West ed. 1992).

Court's repeated refusal to require that jurors be provided a specific definition of "deliberately," this Court's fears have been realized in practice. *See Penry*, 492 U.S. at 322-323.[16]

But even assuming *arguendo*, as this Court did in *Penry*, that the jurors measured Mr. Johnson's conduct against some standard higher than mere "intent," it is plain that the tendency of his youth to prove or disprove the "deliberateness" of his actions did not necessarily bear on his culpability. After all, as this Court noted in *Penry*, Mr. Penry's actions in his offense and its aftermath indicated substantial planning and forethought. *Id.* at 322. If a reasonable juror could have concluded that Mr. Penry's reduced culpability, resulting from his mental retardation, warranted a life sentence notwithstanding the calculated nature of his crime, surely a reasonable juror could have reached the same conclusion with respect to nineteen-year-old Dorsie Johnson.[17] Mr. Johnson's youth, like Mr. Penry's

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[16] The term "deliberate," as applied to homicide, came into the law in the famous Pennsylvania statute of 1792 that created the offense of "first degree murder," a capital crime, as distinct from "second degree murder," which was punished by imprisonment. The term does not, however, describe conduct significantly different from "intentional" or "purposeful" conduct:

> [c]ourts have repeatedly observed that deliberation and premeditation require no particular period of reflection; a very short time before the plan is formed and, once formed, executed, is enough. For this reason, and because it is so unclear what kind or quality of deliberation is required, the formula has been criticized for giving juries power to dispense verdicts of different severity without any workable standard to guide them.

2 Encyclopedia of Crime and Criminal Justice at 858 ("Homicide") (Sanford Kadish ed. 1983). In the same fashion, the bare terms of the first special issue do not suggest "what kind or quality of deliberation" might merit a death sentence for a particular defendant.

[17] This inference is even stronger where, as here, the evidence indicated that Mr. Johnson was asked to assist in the robbery only a

cognitive deficit, made him generally "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct," notwithstanding the "deliberate" character of his actions in committing the crime. *Penry*, 492 U.S. at 322-323. Because "personal culpability is not solely a function of a defendant's capacity to act 'deliberately,' " this Court cannot be certain that the jury's determination that Mr. Johnson acted "deliberately" entailed the "reasoned moral response" that he should die for his "deliberate" actions—particularly when the standard for "deliberateness" under state law is *de minimis*. *Penry*, 492 U.S. at 322.

The Texas Court of Criminal Appeals has interpreted and applied the first special issue in an extremely narrow manner, focusing on a single point in time. That court has held repeatedly that evidence of "a moment of deliberation" suffices to support an affirmative finding. *Kinnamon v. State*, 791 S.W.2d 84, 95-96 (Tex. Crim. App. 1990). *See also Havard v. State*, 800 S.W.2d 195 (Tex. Crim. App. 1989). As a matter of state law, then, the first special issue has always been understood as an extremely limited inquiry into a matter of historical *fact*, and has never encompassed any broad examination of the defendant's moral culpability.[18]

short time before it took place; Mr. Penry, by contrast, had been planning the rape/robbery of his victim for months. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985).

[18] The Texas Court of Criminal Appeals, indeed, has repeatedly and forcefully declared that the capital sentencing jury's task is simply to answer the factual "special issue" questions according to their oath, and not to engage in any broader inquiry into the defendant's moral culpability. *See, e.g., Trevino v. State*, 815 S.W.2d 592, 621 n.11 (Tex. Crim. App. 1991) ("The Supreme Court failed to understand [in *Penry*] that under Texas law the jury does not 'impose the death penalty.' The jury in a capital case decides three special issues and, upon an affirmative finding to each, 'the court shall sentence the defendant to death.' As such, the high Court failed to inform this Court how the jury is to give 'mitigating effect' to evidence that is not capable of

Perhaps more significantly, even if the Texas courts have embraced some special, distinct definition for "deliberateness," as counsel for Respondent suggested before this Court earlier this Term, they have resolutely kept that definition secret. The Texas courts have refused, without exception, to permit (much less require) the *jury* to be instructed regarding the meaning of "deliberateness." *See* Tr. of Oral Argument in *Graham v. Collins*, No. 91-7580 at 28, 32; *see also, e.g., Lewis v. State*, 815 S.W.2d 560, 563 (Tex. Crim. App. 1991) ("We have consistently rejected such claims [asking that "deliberately" be defined] for the past 13 years, and decline to reconsider our settled precedents") (collecting cases). In light of Texas' continuing refusal to instruct the jury regarding "deliberateness," any assertion that the first special issue affords a meaningful vehicle for the consideration of a youthful defendant's personal culpability is unfounded speculation at best.[19]

being considered. . . .") (Citation omitted); *Boyd v. State*, 811 S.W.2d 105, 120 (Tex. Crim. App. 1991) ("We note at the outset that the Texas sentencing scheme does not allow the jury to actually assess a sentence; a jury's role is limited to answering the three special issues. . . ."); *Knox v. State*, 744 S.W.2d 53 (Tex. Crim. App. 1987) ("Since jurors do not actually 'sentence' a defendant in Texas capital cases, their attention should be directed only to answering the special issues without regard to the sentence that will ultimately be imposed.").

[19] The hazards of assuming that the first special issue affords a vehicle for searching inquiry into moral culpability are reflected in this striking statistic: the Texas Court of Criminal Appeals has *never* found the evidence in a particular case *insufficient* to sustain an affirmative answer to the first special issue. Moreover, as the Texas Court of Criminal Appeals conducts its sufficiency analysis, it often focuses exclusively on the circumstances surrounding the commission of the offense (e.g., the number and type of wounds) and not at all on aspects of a defendant's background and character that might make him less culpable for the crime. *See Narvaiz v. State*, 840 S.W.2d 415 (Tex. Crim. App. 1992) (evidence that defendant stabbed victim 63 times); *Green v. State*, 840 S.W.2d 394 (Tex. Crim. App. 1992) (fingerprints on murder weapon and testimony of former cellmate that defendant shot the vic-

Even if the Texas court had articulated a broad conception of "deliberateness" (which it emphatically has not), the language of the first special issue "limit[s] the inquiries to which [the defendant's mitigating evidence] is relevant so severely" that the evidence cannot play a meaningful part in the jury's sentencing decision. *McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment). Similarly, the trial court's additional instruction to the jury, directing them to consider "all the evidence . . . whether aggravating or mitigating in nature," in "determining each of these Issues," *see* Tr. 98, did not afford the jury an adequate opportunity to assess Mr. Johnson's moral culpability.

Indeed, rather than *curing* the problem *Penry* recognized in the application of the former statute, the trial

tim); *Earhart v. State*, 823 S.W.2d 607 (Tex. Crim. App. 1991) (victim was bound, shot in back of head and buried in trash heap); *Farris v. State*, 819 S.W.2d 490 (Tex. Crim. App. 1991) (defendant waited for officer to approach on foot before shooting at point blank range); *Havard v. State*, 800 S.W.2d 195 (Tex. Crim. App. 1989) (defendant aimed rifle at officer's head, yelled freeze, and then shot the officer between the eyes); *Webb v. Texas*, 760 S.W.2d 263 (Tex. Crim. App. 1988) (forensic evidence that a number of nonmortal shooting wounds were inflicted before defendant fired shot that killed victim); *Williams v. State*, 773 S.W.2d 525 (Tex. Crim App. 1988) (evidence defendant planned robbery and stopped shooting only when accomplice suggested victims would die from wounds); *Westley v. State*, 754 S.W.2d 224 (Tex. Crim. App. 1988) (defendant pursued victim in store to shoot at close range); *Rivera v. State*, 725 S.W.2d 311 (Tex. Crim. App. 1986) (victim was repeatedly stabbed); *Rector v. State*, 738 S.W.2d 235 (Tex. Crim. App. 1986) (victim was brought to isolated area, stripped of clothing and shot in the head); *Goodman v. State*, 701 S.W.2d 850 (Tex. Crim. App. 1985) (evidence sufficient for finding of deliberateness despite defendant's retardation); *Buxton v. State*, 699 S.W.2d 212 (Tex. Crim. App. 1985) (eyewitness identification of defendant's presence in store where robbery and murder occurred); *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985) (mentally retarded defendant's confession he planned to rape victim and kill her so she would not "squeal"); *Duffy v. State*, 567 S.W.2d 197 (Tex. Crim. App. 1978) (defendant entered victim's home and stabbed her repeatedly).

court's "mitigation" instruction only *described* it. The special issues provided the *only* vehicle for jurors' consideration of mitigating evidence under the former statute, including evidence bearing directly on personal culpability, such as a teenage defendant's youth. Instructing the jury that it could consider all mitigating evidence as it decided the narrow factual question of "deliberateness" did not permit the jury to return a "no" answer based on Mr. Johnson's reduced culpability. The inquiry into deliberateness cannot be transformed into an inquiry regarding lessened culpability, because the term "deliberateness" as it is fairly understood (and as the Texas courts have confirmed) concerns only the moment in time during which the defendant acted; the question does not address the more crucial question of whether his personal circumstances and youthful judgment made him less capable of understanding the meaning and consequences of his admittedly "deliberate" acts.

The difficulties of squeezing the moral question of reduced culpability into a narrow factual inquiry are evident in other contexts. For example, no one would suggest that a jury in a guided-discretion jurisdiction, such as Florida, could consider a teenage defendant's "personal culpability" in determining, for example, whether "the capital felony was committed by a person under sentence of imprisonment."[20] Just as a youthful defendant's culpability would be irrelevant in determining such a narrow question of fact, so nineteen-year-old Dorsie Johnson's culpability was irrelevant in determining the *factual* question whether he acted "deliberately" in causing the victim's death. Thus, there is a reasonable likelihood that the jury's reasoned moral response to his youth could not find expression in their answer to the first special issue.

[20] *See* Fla. Stat. Ann. § 921.141(5) (Supp. 1976-1977); cited in *Proffitt v. Florida*, 428 U.S. 242, 248 (1976).

Significantly, the first special issue contained other language that, reasonably understood, limited and informed the jurors' understanding of their task, and which increased the likelihood that their response to Mr. Johnson's culpability could not find expression in their answer to the first special issue. Namely, in addition to asking whether the defendant acted "deliberately," two other key phrases framed and narrowed the inquiry:

> Whether the *conduct of the defendant that caused the death of the deceased* was committed deliberately *and with the reasonable expectation that the death of the deceased or another would result*;

(former) Tex. Code Crim. Proc. Art. 37.071 (b) (1) (emphasis added). Both highlighted phrases confined the assessment of "deliberateness" to the act that *caused the death*.[21] Fairly read in context, the language of the first special issue as a whole focused on the homicidal *act*, to the exclusion of the defendant's character and background. As the Chief Justice has emphasized, "the doctrine of *noscitur a sociis* is based on common sense," *Brown*, 479 U.S. at 543; this Court must consider the probable effect of this additional language on the jury's understanding of the first special issue.

3. The second special issue, by focusing on Mr. Johnson's likely behavior in the future, offered no vehicle through which the jury could consider Mr. Johnson's culpability for the offense already committed.

Nor could the jury give Mr. Johnson's youth and background constitutionally adequate consideration under the

[21]The latter half of the special issue, in particular, seems tailored to an *Enmund*-type "eligibility" determination, rather than to a broader assessment of moral culpability. *See* and *compare* the revised Texas capital sentencing statute, Tex. Code Crim. Proc. Art. 37.071 (Vernon's ed. 1992) (replacing the "deliberateness" inquiry with an explicit *Enmund* finding); *see also Enmund v. Florida*, 458 U.S. 782 (1982).

second special issue. As Justice Souter has recognized, the "future dangerousness" inquiry has an entirely utilitarian function; it attempts to identify those convicted murderers who are beyond reasonable incapacitation, and who will therefore pose a "continuing threat" to the community. *Graham*, ___ U.S. ___ , 113 S.Ct. 892, 922 (1993) (Souter, J., dissenting). Accordingly, Mr. Johnson's jury could consider his youth under the second special issue only if it believed that his youth increased the likelihood of his rehabilitation. The jury could not, however, answer "no" to the second special issue based on a "backward-looking" assessment of Mr. Johnson's reduced moral culpability. Indeed, if the jury concluded that Mr. Johnson was incapable of rehabilitation (or even that Mr. Johnson's rehabilitation would be a long time in coming), it could not have given Mr. Johnson a sentence less than death based on its view that he did not fully appreciate the meaning of his actions at the time of the crime.

The "forward-looking" perspective of the second special issue thus profoundly distorts the consideration of relevant mitigating evidence; such evidence can only affect the answer to the second special issue to the extent that it tends logically to prove or disprove the likelihood of future violent acts. Thus, a jury limited to the second special issue can only give effect to evidence about the defendant's character and background—about past or present facts—in making predictions about the future; because many such facts have only a tangential, attenuated relationship to the defendant's future behavior, substantial mitigating aspects of such relevant evidence are inevitably "lost in translation."[22]

[22] The insight that a "future dangerousness" inquiry is inadequate to permit full consideration of a capital defendant's youth is further confirmed by *Eddings*. Under the Oklahoma scheme at issue in that case, the trial court was required to determine whether Eddings posed a "continuing threat to society." *See Eddings*, 455 U.S. at 107, citing

At least two Members of the present Court have acknowledged this vital conceptual distinction between evidence about personal culpability and evidence predicting future behavior. In *Truesdale v. Aiken*, 480 U.S. 527 (1987), the Court summarily reversed a decision of the South Carolina Supreme Court, which had refused retroactively to apply this Court's decision in *Skipper v. South Carolina*, 476 U.S. 1 (1986).[23] Justice Powell argued in dissent that *Skipper* did not follow from *Lockett* and *Eddings*, because it concerned "evidence that was *unrelated to culpability*. Rather, the State was required to admit evidence relevant to the defendant's probable future conduct as a prisoner." 480 U.S. at 528 (Powell, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting) (emphasis added). That is, the dissenters explicitly recognized that a judgment about a defendant's culpability is, at least as a logical matter, not necessarily coextensive with a prediction of his future conduct.

There is nothing unconstitutional about a State's choice to emphasize the deterrence rationale[24] in structuring its

Okla. Stat., Tit. 21, § 701.12(7) (1980). The judge evidently weighed Eddings' youth, along with the other facts about his background and the circumstances of the offense, in making his findings. In reviewing Eddings' claim, this Court did not suggest that such foreshortened, coincidental "consideration" of a teenage defendant's youth might satisfy the Eighth Amendment. On the contrary; this Court properly concluded that the risk that Eddings had been sentenced to death despite the existence of factors calling for a lesser sentence was intolerably great, and vacated his death sentence. 455 U.S. at 116-117, 119.

[23] In *Skipper*, the Court had held that a capital defendant was entitled to present evidence of his successful adjustment to confinement *after* his capital offense in support of a sentence less than death *for* that offense. *Skipper*, 476 U.S. at 4.

[24] This Court has suggested that the permissible rationales which may constitutionally support capital punishment are "retribution and deterrence." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

capital sentencing statute.[25] However, if the State limits the jury's factual inquiry to "future dangerousness," it risks denying the defendant an assessment of his present moral culpability—a determination this Court's Eighth Amendment cases require.[26] Because Texas has never directed the jury to fully consider the defendant's personal culpability as part of answering the *first* special issue, the "future dangerousness" question—which, as discussed above, is singularly ill-fashioned for the purpose—may be the only vehicle for the jury's assessment of reduced culpability. That consequence helps explain why Mr. Johnson's youth and background had mitigating relevance "outside the scope" of the two narrow questions to which his jury was limited, and why the trial court's feeble instruction to consider mitigating evidence *in answering the special issues* could not correct this pervasive constitutional flaw.

At the same time that Mr. Johnson's youth could not be considered as limiting his moral culpability, his youth might have convinced a jury that he was *more* likely to

[25] Indeed, at least two other states employ a "continuing threat" aggravating factor, but do so in statutory schemes that properly permit the sentencer to assess the *aggravating* evidence of "dangerousness," and then *independently* to determine whether the *mitigating* evidence nevertheless justifies a life sentence. *See* Va. Code Ann. § 19.2-264.4C (Michie 1992) (future dangerousness one of two aggravating factors; one must be established before death may be imposed); Va. Code Ann. § 19.2-264.4B(v) (age of the defendant is mitigating factor which may support life sentence); *See also* Okla. Stat., Tit. 21, § 701.12 (7) (1980) ("continuing threat" aggravator); Okla. Stat., Tit. 21, § 701.10 (1980).

[26] This Court's cases suggest that a State which designed its capital punishment system only to effectuate the "deterrence" rationale, and to preclude the consideration of "culpability" evidence (that is, evidence that goes to the appropriate *retribution* for the offense), would violate the Eighth Amendment. After all, if a State were free to ignore the retributive basis for the sanction, there would be no reason for invalidating certain sentences as disproportionate, since "proportion" surely has no relationship to the deterrent effect of the potential penalty. *See, e.g., Coker v. Georgia*, 433 U.S. 584 (1977).

be a danger in the future. Simply put, youth has an aggravating "edge" under the second special issue because the jury must consider a longer period of time during which the young defendant may commit some violent act, than a jury must consider when faced with an older offender.[27]

Justice Souter has noted this same pernicious effect:

> [T]he second special issue [is inadequate] even to take account of the possibility that [the youthful defendant] may be less dangerous as he ages. . . . [Such a defendant] could well be held dangerous in the future by reason of continuing youth . . . [and his youth would thus be] considered under the second issue as aggravating, not mitigating.

Graham, ___ U.S. at ___, 113 S.Ct. at 925 (Souter, J., dissenting). A plurality of the Texas Court of Criminal Appeals has agreed:

> Viewing mitigating evidence in the light most favorable to the jury's [affirmative] answer [to the second special issue] . . . may mean in some cases actually considering evidence proffered in mitigation, such as *youth*, drug dependency, a history of child abuse, etc., . . . to militate in favor of an affirmative answer in the narrower confines of special issue two itself.

[27] Of course, evidence relevant to a capital defendant's fate may often have this "two-edged" quality. For example, evidence of drug abuse, while potentially mitigating, *see Bell v. Ohio*, 438 U.S. 637, 641 (1978), could also be perceived as aggravating by a particular juror since it might reflect voluntary lawless behavior. The key difference is that under the former Texas statute, a reasonable juror who regarded such "two-edged" evidence as *mitigating*, and wanted to impose a life sentence on that basis, could not do so within the straitjacket of the unadorned special issues.

Burns v. State, 761 S.W.2d 353, 355 (Tex. Crim. App. 1988).[28]

The prosecutor's closing argument, of course, echoed this same theme; he conceded that it was possible that Mr. Johnson's potential for violence might fade "twenty or forty years down the road," but insisted that the jury should not take that chance. JA 91, 107. This argument can only be understood to focus on the *immediate* future—a period with respect to which Mr. Johnson's youth was singularly aggravating under the narrow inquiry of the second special issue.

Observations about the potentially "aggravating" treatment of youth reflect a more basic fact about the second special issue. The second special issue is designed to be an open-ended inquiry that renders immediately and obviously relevant every remotely "bad" act a person has ever committed. The Texas Court of Criminal Appeals has assiduously interpreted the second special issue to allow the admission of all sorts of aggravating evidence, seemingly without regard to its underlying reliability. For example, the second special issue can give aggravating effect to evidence of unadjudicated offenses, *Motley v. State*, 773 S.W.2d 283 (Tex. Crim. App. 1989); juvenile offenses, *Goodman v. State*, 701 S.W.2d 850 (Tex. Crim. App. 1985); and bad reputation, *James v. State*, 772 S.W.2d 84 (Tex. Crim. App. 1989), to name but a few.

The second special issue is a "gatekeeper," one which swings wide to admit evidence in aggravation, but opens

[28] See also Stewart v. State, 686 S.W.2d 118, 125 (Tex. Crim.App. 1984), (Clinton, J., dissenting) (defendant's youth has "tremendous specific probative weight in favor of answering the future dangerousness question 'yes' "); *see also Eddings*, 455 U.S. at 126 n. 8 (Burger, C.J., dissenting) (citing studies indicating that a majority of violent youths continue to be violent for some indeterminate period before "aging out").

barely a crack for evidence supporting a lesser sentence.[29] The present case offers a classic example: the prosecutor presented—at great length and in elaborate detail, both through live witnesses and documentary evidence—numerous incidents from Dorsie's childhood that are characteristic of unruly pre-teens. Thus, for example, the jury could fully consider and give effect to evidence that twelve-year-old Dorsie Johnson gave his seventh-grade teacher "the finger," while it paradoxically could give no effect to the mitigating aspects of his youth.

The second special issue, then, failed in this case as a vehicle for the jury's consideration of Mr. Johnson's youth as it bore on his personal culpability. A prediction of future behavior is not the same thing as an assessment of moral culpability for a crime already committed; thus, the question's exclusive focus on the prediction of future events rendered the most salient attributes of Mr. Johnson's youth tangentially relevant at best. Worse, the preclusive effect of the "forward-looking" query rendered the most important qualities of Mr. Johnson's youth, which bore directly on his moral culpability, wholly irrelevant. In addition, the jury could reasonably have concluded that the nineteen-year-old Mr. Johnson, by reason of his continuing youth, would pose a threat of violence for some time—requiring an affirmative answer to the second special issue. The narrow focus of the second special issue, while inviting unrestrained introduction of aggravating evidence, did not

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[29] The court below has interpreted the second special issue with such breadth that seemingly trivial transgressions are adequate to sustain an affirmative finding. For example, the Texas court has held that an affirmative finding to the second special issue—and therefore a sentence of death—is appropriately predicated on evidence that a defendant "unlawfully shot a cow" or "wantonly shot and killed a buffalo." *Farris v. State*, 819 S.W.2d 490 (1990). Likewise, Texas may condemn a defendant to death based on evidence from a high school vice-principal that the defendant was truant, smoked cigarettes, and disrupted classes. *Kunkle v. State*, 771 S.W.2d 435, 446 (Tex. Crim. App. 1986).

in any way provide a vehicle for the essentially *moral* inquiry underlying the individualization requirement. Because the jury could have concluded that Mr. Johnson's reduced moral culpability justified sparing his life despite his status as a likely "future danger," but had no way to express that reasoned moral response in answering the factual inquiry of the second special issue, Mr. Johnson's resulting death sentence violates the Eighth Amendment.

CONCLUSION

By its own terms, the former Texas statute permits only two narrow *factual* determinations, while this Court's sentencing jurisprudence now makes plain that capital sentencing is first and foremost a *moral* inquiry into the *appropriateness* of a death sentence.[30] This Court's recognition that individualization, and not rigidity, is the watchword of such a jurisprudence reflects a thoughtful and profound movement in Anglo-American criminal law. As Radzinowicz has noted, inflexibility "disregarded the fundamental principle which is essential to any effective system of crime-prevention and which has been aptly described by Raymond Saleilles as *le principe de l'individualisation de la peine.*" Radzinowicz, 1 *A History of English Criminal Law and Its Administration* at 14 (1948).[31]

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[30] To say that the capital sentencing inquiry is moral is not to say that it is unguided, or unprincipled, or without meaningful limitation, as Justice Thomas has suggested. *Graham*, ___ U.S.at ___, 113 S.Ct. at 912, (Thomas, J., concurring). It is merely to recognize that the factors which weigh in the decision will reflect human experience, legal tradition, and community values as much as empirical fact. Indeed, the moral character of the sentencing inquiry lies in the jury's serious assessment of the profound *consequences* of the empirical facts about the offense and the offender, as reflected in the choice between life and death.

[31] Radzinowicz cites numerous authors endorsing this view, foremost among them Sir James FitzJames Stephen. *Id.* at 14 n. 46.

Though Dorsie Lee Johnson was only nineteen at the time of the offense, and although the mitigating power of his youth was heightened by the other facts and circumstances of his background, the jury could consider only whether he had acted "deliberately" and whether he might pose a "continuing threat" of criminal violence. Once it answered both questions in the affirmative, a death sentence was mandatory. The trial court's weak instruction to consider "mitigating" evidence *in answering the special issues* failed to broaden the jurors' discretion to consider Mr. Johnson's youth and background, because it still forced them to consider his mitigating evidence only insofar as it tended to disprove the aggravating special issues, not as the evidence bore on his personal moral culpability.

Here, as in *Penry*, there is a reasonable probability that the substantial mitigating qualities of Mr. Johnson's youth and background could have persuaded a rational juror that death was an excessive punishment for his crime. The former statute, however, forced the jurors to ignore any aspect of Mr. Johnson's youth not related to either his *mens rea* at the time of the homicide, or the likelihood that he would continue to pose a "threat" for some unspecified period in the future. Accordingly, this Court cannot be confident that the jury's "reasoned moral response" to Mr. Johnson's personal culpability is reflected in its bare affirmative answers to the special issues.

As this Court has held, striking down a mandatory death provision, "the inferences to be drawn concerning a defendant's character and moral culpability may vary depending on the nature of the past offense." *Shuman*, 483 U.S. at 81. In precisely the same manner, the inferences to be drawn concerning Mr. Johnson's moral culpability could be strongly affected by his youth and background, even after the jury had determined that he acted with the necessary minimal "deliberateness," and might continue to be violent for some unspecified interval in the future. Because the jury had no vehicle for expressing the reasonable

inference—the "reasoned moral response"—that Mr. Johnson's youth and background rendered him less culpable, and thus rationally warranted a sentence less than death notwithstanding the affirmative answers to the special issues, the resulting death sentence violates the Eighth Amendment.

Petitioner Dorsie Lee Johnson, Jr., thus respectfully prays that this Court reverse the judgment of the Texas Court of Criminal Appeals in his case and remand with directions to vacate his unconstitutional sentence of death.

Respectfully submitted,

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